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NO. 92-816

In the Supreme Court of the United States

D.R., a minor child, by her parent and natural guardian, L.R. and L.R., individually and in her own right and L.H., Bucks County, Pennsylvania,

Petitioners,

v.

MIDDLE BUCKS AREA VOCATIONAL TECHNICAL SCHOOL; WILLIAM GOODE; JAMES C. BAZZEL; MARTHA RICHINO; SUSAN PETERS; BUCKS COUNTY INTERMEDIATE UNIT NO. 22; CHRISTINA TUTTLE; PENN RIDGE SCHOOL DISTRICT; CHARLES FAMBRO; FRED FREEMAN; JAMES A. GALLAGHER; BRIAN MILLER; MARC R. RATCLIFFE; JAMES M. SPERLING; LESTER SUTPHIN

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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I. QUESTION PRESENTED FOR REVIEW

The question to which the Petition for Writ of Certiorari in this case addresses itself is more accurately stated as follows:

> Whether compulsory school attendance as it exists under the law of Pennsylvania creates a custodial relationship between public school employees and students sufficient to establish a Constitutionally-cognizable "special relationship" and concomitant affirmative duty to protect public school students from private misconduct.

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STATUTES INVOLVED IN THE CASE

This case also involves the various compulsory school attendance provisions of the Pennsylvania Public School Code of 1949, Act of March 10, 1949, P.L. 30, art. XIII, §§1326, 1327, 1327.1, 1329, 1330, 1333, *as amended*, Pa. Stat. Ann. tit. 24, §§13-1326, 13-1327, 13-1327.1, 13-1329, 13-1330 and 13-1333, and the implementing provisions of the Pennsylvania State Board of Education, 22 Pa. Code Chapt. 11. Since these provisions are lengthy, respondents shall set forth their full text in their brief on the merits, in the event that this Court grants the Writ, in accordance with Supreme Court Rule 24.1(f).

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No. 92-816

In the Supreme Court of the United States

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

STATEMENT OF THE CASE

Plaintiff, D.R., by her parent and natural guardian, L.R., filed her original Complaint on May 2, 1990. Plaintiff, L.H., followed on May 3, 1990 with the filing of her Complaint. In their Complaints, each of the plaintiffs essentially raised a substantive due process clause claim through the Federal Civil Rights Act codified at 42 U.S.C. §1983.

The school defendants preliminarily moved to dismiss the Complaints by filing motions to dismiss pursuant to Fed.R.C.P. 12(b)(6) arguing that no constitutionally protected Civil Right had been involved, facts necessary to establish the "deliberate indifference" standard had not been pleaded and that the individual school defendants enjoyed qualified immunity. After oral argument on the original motions to dismiss, the District Court (Giles, J.), directed plaintiffs to amend their Complaints so as to satisfy the heightened specificity requirement applicable to pleading the deprivation of a Civil Right.

On October 16, 1990, plaintiffs filed their Amended Complaints which still did not plead any discrete prior events so as to put school defendants on notice of the alleged assaultive behavior by the male students. Rather, plaintiffs' Amended Complaints alleged a panoply of disruptive behavior, i.e., students jumping, breaking windows, uttering obscenities, etc., all of a non-sexual nature.

School defendants renewed the motions to dismiss plaintiffs' Amended Complaints pursuant to Fed.R.C.P. 12(b)(6). On

February 1, 1991, the District Court granted the motions to dismiss the Federal Civil Rights claims. While the District Court held a "special relationship" existed so as to give rise to a constitutional duty to protect the students' substantive due process interest in bodily integrity, the District Court dismissed the Amended Complaints because the facts, as pleaded, failed to establish reckless indifference to a constitutionally protected right. The District Court also believed the individual school defendants would enjoy "qualified immunity".

On appeal to the United States Court of Appeals for the Third Circuit, on December 31, 1991 that court affirmed the Order of Dismissal, albeit on a different basis. There, the court reasoned that no constitutionally recognized interest had been impugned because Pennsylvania's mandatory school attendance laws are insufficiently custodial in nature to create a "special relationship" to the point that a concomitant duty would be placed on the school officials to protect high school students from private misconduct relying, in large part, upon this court's decision in *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989).

The Third Circuit revisited the precise issue again in an *en banc* rehearing and in applying *DeShaney* refused to include students in that class of individuals subject to a restraint on personal liberty similar to prisoners.[1]

COUNTER-STATEMENT OF FACTS

Procedurally, this matter involves a judgment in response to a preliminary motion to dismiss pursuant to Fed.R.C.P. 12(b)(6) that plaintiffs' Amended Complaints failed to allege a deprivation of any right secured by the Constitution. The Third Circuit enjoyed plenary review of the dismissal of the Amended Complaints and accepted as true the facts alleged in the

1. Senior Circuit Judge Collin Seitz sat for the *en banc* argument with the twelve active judges presently on the Third Circuit. Senior Circuit Judge Seitz authored the majority panel opinion as well as the opinion of the court upon rehearing *en banc*. While the panel opinion, filed December 31, 1991 is not officially reported and has been withdrawn by the court, the opinion of the United States Court of Appeals for the Third Circuit *(en banc)* is reported at 972 F.2d 1364 (3rd Cir. 1992).

Amended Complaints and all reasonable inferences drawn from them. *Markowitz v. Northeast Land Company*, 906 F.2d 100, 103 (3rd Cir. 1990). Accordingly, the pertinent facts for purposes of this matter at this stage can be gleaned from specific factual allegations in the Amended Complaints excepting vague and conclusory allegations. See, e.g. *Rotolo v. Borough of Charleroi*, 532 F.2d 920, 922 (3rd Cir. 1976).

Plaintiffs, D.R., then age 16, and L.H., then age 17, were two female students in a high school graphic arts class at the Middle Bucks Area Vocational Technical School during the 1989-90 school year (App. at 336). Plaintiffs alleged that several male classmates physically, verbally and sexually molested them over a five to six month period.

Plaintiff, D.R., attended Middle Bucks pursuant to an agreement with Penn Ridge School District and Bucks County Intermediate Unit No. 22. Defendant, Susan Peters, had been the teacher in the graphic arts classroom during all times relevant. Other individual defendants, William Goode and James Bazzell, building administrators, as well as Martha Richino and Christina Tuttle, guidance counselors, although not present in the graphic arts classroom, allegedly failed to respond despite plaintiffs' allegations that they "should have known" of the assaults. Significantly, plaintiffs do not allege that individual defendants had been specifically informed of sexual molestation but assert that they knew or should have known of such sexually assaultive behavior based on other general allegations of misconduct including students jumping, uttering obscenities and remaining in the bathroom adjacent to the classroom for extended periods of time. No specific knowledge as to any school authority is appropriately alleged.[2] At most, plaintiffs' allegations in the Amended Complaints indicate that the

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2. Plaintiff, L.H., avers in paragraph 62 of her Amended Complaint that in December, 1988 she told defendant, Bazzel, that one student defendant had been trying to force her into the rest room. Defendant, Bazzel, attached an Affidavit to his Motion to Dismiss pursuant to Fed.R.C.P. 12(b)(6) effectively transforming it into a Motion for Summary Judgment pursuant to Rule 56. This Affidavit indicates that defendant, Bazzel, had not been employed as the Assistant Director of Middle Bucks Area Vocational Technical School in December, 1988.

students engaged in horseplay and other acts of misbehavior in front of the teacher. No discrete events placing the teacher or, for that matter, any school defendant, on actual knowledge of sexually assaultive behavior is averred.

While plaintiffs have included extraneous material in the reproduced record, specifically the transcript of the juvenile delinquency hearing of the male-student defendants who were adjudicated juvenile delinquent based upon their assaultive behavior, the relevant inquiry here is limited to those facts and inferences fairly deducible from the Amended Complaints themselves.

LEGAL ARGUMENT

REASONS FOR DENYING THE WRIT

Petitioners appear to offer two reasons in support of their demand that the Court issue a Writ of Certiorari to the U.S. Court of Appeals for the Third Circuit Court in this case. The first is that the Circuit Court, in concluding that Pennsylvania compulsory school attendance laws do not create a custodial relationship between public school employees and students sufficient to establish a Constitutionally-cognizable "special relationship", either misapplied the reasoning of this Court in *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989), or somehow decided an important and unsettled question of federal law that warrants review by this Court.[3] The second is that the recent decisions of the Third, Seventh and Tenth circuits — all of which concluded that compulsory attendance laws do not give rise to a "special relationship" within the meaning of *DeShaney* because the quality of coercion in attending school is unlike incarceration or institutionalization — appear to be inconsistent with *obiter dictum* contained in a recent decision of the Fifth Circuit in a case that, unlike *DeShaney* or the instant matter, involved misconduct by a *state* actor.[4] Your respondents, who were denominated the

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3. Petitioners cite to Supreme Court Rule 10.1(c) in support of this proposition.

4. Petitioners cite to Supreme Court Rule 10.1(a) in support of this proposition.

"school defendants" in the courts below,[5] contend that neither of these proffered reasons constitute adequate ground for issuance of a writ in this case. Respondents offer the following elaboration:

1. Compulsory School Attendance Laws Of The Commonwealth Of Pennsylvania Do Not Create A "Special Relationship" Giving Rise To A Concomitant Constitutional Duty On The Part Of School Defendants To Protect Students From Private Misconduct And The Circuit Court Correctly Applied The DeShaney Standard

Petitioners do not appear to dispute that this case, which concerns claims raised under the Due Process Clause under the Fourteenth Amendment for the alleged failure of public employees to prevent misconduct by private actors, is governed by this Court's constitutional analysis in *DeShaney*. The question thus is not whether this Court has previously addressed and settled the important question of Federal law here at stake, but whether it has done so with sufficient clarity. The *DeShaney* decision has indeed offered the lower federal judiciary a clear enunciation of the applicable Federal law. It has done so with such clarity, in fact, that all three Federal Circuit Courts that have needed to apply *DeShaney* in the context of public school compulsory attendance have ruled consistently on the point. To the extent, moreover, that difficulties might arise in the application of *DeShaney* principles to public schools, the difficulties arise in the interpretation of the meaning and breadth of various state compulsory school attendance laws.[6] The interpretation of state law is an area in which this Court has traditionally deferred to the judgment of circuit courts. *See e.g., Frisby v. Schultz*, 487 U.S. 474, 482 (1989) ("normal practice" is to defer to lower federal courts in construction of state

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5. *See* App. at A-31 and A-56. The respondents who join in this brief are Middle Bucks Area Vocational-Technical School, William Goode, James C. Bazzel, Martha Richino, Susan Peters, Bucks County Intermediate Unit No. 22, Christina Tuttle and Penn Ridge School District.

6. Indeed, at the heart of the dissent raised in the circuit court's *en banc* opinion lies a difference of opinion about the nature of compulsory school attendance under *Pennsylvania* law. (App. at A-90 through A-94).

law); *Maynard v. Cartwright*, 486 U.S. 356, 360-361 (1989) ("[w]e normally defer to courts of appeals in their interpretation of state law"); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (lower federal courts "are better schooled and more able to interpret the laws of their respective states"); *Haring v. Prosise*, 462 U.S. 306, 314n.8 (1983) ("it is our practice to accept a reasonable interpretation of state law by the court of appeals"); *Mills v. Rogers*, 457 U.S. 291, 306 (1982) (court of appeals "better situated" to determine significance of changes in state law); *Butner v. United States*, 440 U.S. 48, 58 (1979) ("federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position than we [to interpret state law]").

This Court could not have stated more directly in *DeShaney* that "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *DeShaney*, 489 U.S. at 197. While the Court did recognize in its precedents "certain limited circumstances" in which the Due Process Clause might be read to impose upon public employees "affirmative duties of care and protection" against private misconduct, *Id.* at 198, the obvious intent to restrict this limited exception to cases very similar to those which established the precedent cannot be ignored. The precedent cited by the Court in *DeShaney* for the most part concerned the duty to provide medical care to prisoners restrained by the circumstances of incarceration from obtaining such care for themselves, *see Estelle v. Gamble*, 429 U.S. 97, 103-104 (1976), and the duty to ensure the "reasonable care and safety" of involuntarily committed mental patients, *see Youngberg v. Romeo*, 457 U.S. 307, 324 (1982). The Third Circuit majority in the present case recognized that *Youngberg* expanded the affirmative duty analysis beyond the Eighth Amendment penological context of *Estelle* and into the broader realm of the Fourteenth Amendment's Due Process Clause (App. at A-65) but did not lose sight of the extremely narrow confines into which this Court placed the *Estelle-Youngberg* exception in *DeShaney*.

Central to this Court's reasoning in *DeShaney* was its synthesis of the "affirmative duty" precedent presented in the following oft-quoted passage:

> The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs — *e.g.* food, clothing, shelter, medical care and reasonable safety — it transgresses the substantive limits on State action set by the Eighth Amendment and the Due Process Clause. . . . In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf — through incarceration, institutionalization or similar restraint of personal liberty, which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.

DeShaney, 489 U.S. at 200. This core statement of principles presents several clear standards directly applicable to this case: (1) the State must affirmatively restrain the individual from providing for his or her basic human needs; (2) the manner of restraint must resemble or be similar to incarceration or institutionalization, *see also Collins v. City of Harker Heights*, ____ U.S. ____, 112 S. Ct. 1061, 1069-70 (1992) (minimal "custodial standards" apply to "conditions of confinement"); (3) the *scienter* of individual public employees or of the state in general is irrelevant; and (4) the failure of individual public employees or of the State in general to act to protect the individual, even against known dangers, is irrelevant. To inject into the analysis elements of *scienter*, thus requiring an inquiry into whether particular public employees knew or should have known certain facts, or to establish a constitutional duty to act under circumstances that would motivate a "reasonably prudent public employee" to act, would run clearly contrary to the well-established notion that the Due Process Clause is not a vehicle through which common law tort principles are applied to state actors, *see Collins v. City of Harker Heights*, ____ U.S. ____, 112 S. Ct. at 1070; *DeShaney*, 489 U.S. at 202; *Daniels v. Williams*, 474 U.S. 327, 332-33 (1986). This Court plainly established in *DeShaney* that it would not invoke the substantive

protections of the Due Process Clause when "[t]he most that can be said of the state functionaries . . . is that they stood by and did nothing when suspicious circumstances dictated a more active role for them." *DeShaney*, 489 U.S. at 203.

Petitioners nevertheless seek to re-define the "special relationship" as recognized in *DeShaney*, *Estelle* and *Youngberg* from one based primarily on physical custody or other similar restraint to one based on the notion that constitutional liability can result from conduct of school officials that increases the risk of harm or danger from third parties. This proposed, supposedly limited, extension of the *Estelle/Youngberg* exception recognized in *DeShaney*, assuming arguendo its legitimacy, would not apply to this case. The school defendants cannot be said to have created plaintiffs' peril, increased their risk of harm or acted to render them more vulnerable to the student defendants' assaultive behavior in a constitutionally significant manner, unless the Court is now willing to use the Due Process Clause to impose upon public school officials tort-like duties concerning the construction and maintenance of school buildings or the supervision of classrooms.[7] Accordingly, the facts of the instant matter do not lend themselves to the "state created danger" analysis suggested by petitioners and the writ should not be granted to visit this supposed neutral principle when the underlying allegations fail to establish any state-created or imminently enhanced danger.

The two other circuit courts that have addressed the issue

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7. This state-created danger theory, utilized to find a constitutional tort duty outside of a custodial context, has been recognized by several courts of appeals. *Cornelious v. Town of Highland Lake*, 880 F.2d 348 (11th Cir. 1989); *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989), *cert. denied*, ____ U.S. ____, 111 S. Ct. 341 (1990), as quoted in *D.R. by L.R. v. Middle Bucks Area Vocational Technical School*, 972 F.2d at 1373. While the Supreme Court has not directly addressed this "state created danger" test in the context of America's schools, the instant case is not the appropriate vehicle for consideration of this proposed tenet because there are no factual allegations of an injury made more imminent by state action. See D.R., 972 F.2d at 1375. Moreover, in the progeny of cases finding a duty created by the affirmative act of the state placing a person in danger, the danger had been imminent. *See, e.g., Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982) (state created general risk by releasing potentially dangerous man from state custody as opposed to particular risk to plaintiff); *see generally, Dorothy J. v. Little Rock School District*, 794 F. Supp. 1405, 1417-1421 (E.D. Ark. 1992).

of whether state compulsory school attendance laws establish a "special relationship" and a concomitant affirmative duty to protect students against private misconduct have had little trouble applying *DeShaney* as the Third Circuit did in this case. *See Maldonado v. Josey*, 975 F.2d 727, 732-33 (10th Cir. 1992); *J.O. v. Alton Community Unit School Dist. 11*, 909 F.2d 267, 272-73 (7th Cir. 1990). The distinction drawn for purposes of constitutional analysis by the Third, Seventh and Tenth Circuits between compulsory school attendance and more accepted notions of involuntary confinement such as incarceration and commitment is firmly rooted in the precedent established by this Court. *See Ingraham v. Wright*, 430 U.S. 651, 670 (1977). The principles of Federal law applicable to the present case are thus well settled primarily by *DeShaney* but also by guidance offered in the area of "constitutional tort" in such cases as *Ingraham* and *Collins*. That three federal circuit courts have so consistently applied *DeShaney* in the context of compulsory school attendance is ready confirmation that the precedent is clear and further review by this Court is unnecessary.[8]

This case necessarily and ultimately hinges, of course, on the interpretation of state compulsory attendance law offered by the Circuit Court. As noted above, this Court has traditionally deferred to the circuit courts on such matters.[9] The Circuit Court had a sound basis for its conclusion that, under Pennsylvania law, "parents remain the primary caretakers, despite [the student's] presence in school" (App. at A-70) and that the

8. The contrary *obiter dictum* of the Fifth Circuit in *Doe v. Taylor Independent School Dist.*, 975 F.2d 137 (5th Cir. 1992), is discussed further under the following argument heading, as are the decisions of the Seventh and Tenth circuits in *Maldonado* and *J.O. v. Alton* and this Court in *Ingraham*.

9. Respondents recognize that the district court in this case found that compulsory attendance *does* create a "special relationship". (App. at A-10 through A-11). The Court, however, essentially concedes this point *arguendo* (App. at A-10) without much more than a cursory review of the applicable state law. State law interpretations without substantiation do not receive the deference they might otherwise receive. *See Virginia v. American Booksellers Association, Inc.*, 484 U.S. 383, 395 (1988). The circuit court, moreover, must always conduct a plenary review of district court interpretations of state law. *See Salve Regina College v. Russell*, ___ U.S. ___, ___, 111 S. Ct. 1217, 1221 (1991).

incidents of compulsory school attendance in Pennsylvania do not create the sort of "special relationship" clearly contemplated by this Court in *DeShaney*.

In Pennsylvania, as elsewhere, parents are charged with the duty of care and control of their children, including the provision of such subsistence and education as is needed for the child's physical, mental and emotional health. *See Appeal of Diane B.*, 456 Pa. 429, 433, 321 A.2d 618, 620 (1974); *Commonwealth v. Barnhart*, 345 Pa. Super. 10, 18, 497 A.2d 616, 620-21 (1985), *allocatur denied*, 517 Pa. 620, 538 A.2d 874, *cert. denied sub nom, Barnhart v. Pennsylvania*, 488 U.S. 817 (1988). Indeed, the failure of the parent to meet the child's basic human needs, including education, can constitute grounds for adjudicating the child "dependent", *see* 42 Pa. Cons. Stat. Ann. §6302, and can result in removal of the child from parental custody, *see Id.* at §6351(a)(2). Although parents are subject to fine if their child of compulsory school age is not receiving an education through one of the prescribed means, *see* Public Schools Code of 1949, Act of March 10, 1949, P.L. 30, art. XIII, §§1327, 1333, *as amended*, Pa. Stat. Ann. tit. 24, §§13-1327, 13-1333, the Circuit Court correctly noted (App. at A-70) that under Pennsylvania law, any parent "is justified in withdrawing his child from a school where the health and welfare of the child is threatened," notwithstanding the compulsory attendance provisions of the School Code, *Zebra v. School District of City of Pittsburgh*, 449 Pa. 432, 438, 296 A.2d 748, 751 (1972); *see also Com. ex rel. School District of City of Pittsburg v. Ross*, 17 Pa. Commw. 105, 107, 109-10, 330 A.2d 290, 291, 292 (1975).

Compulsory school attendance in Pennsylvania is an extremely limited concept. The compulsory attendance provisions of the School Code, Pa. Stat. Ann. tit. 24, §§13-1326 through 13-1339, require only that children ages eight through sixteen attend public or private "day school", a private trade or business school, or a boarding school or receive instruction from a private tutor or through a program of home education provided by the parent.[10]

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10. Since plaintiff, L.H., had been 17 years of age at all times relevant (App. at 336) it does not appear the Pennsylvania compulsory school attendance scheme could be the source of any constitutional duty to protect L.H. from private misconduct.

See Id. at §§13-1327, 13-1327.1. Children of compulsory school age are only required to attend school, when not legally excused, *see* 22 Pa. Code §§11.21 through 11.28, for a total of 180 days per year or, alternatively, for 990 hours per year at the secondary level and 900 hours at the elementary level, *see* Pa. Stat. Ann. tit. 24 §§13-1327(b), 15-1501, 15-1504(a); 22 Pa. Code §11.1 through 11.3. Children whose parents opt to take advantage of the free education offered in the public schools, moreover, retain substantial personal freedom during their limited time in school. *See e.g.*, 22 Pa. Code §§12.5 (placing substantial limitations on corporal punishment and use of force); 12.12 (protecting student's confidential communications with school staff); 342.36 (severely limiting or prohibiting the use of restraints and corporal punishment for children with disabilities).[11] The numerous state and federal laws that govern operation of the public schools all rest on the assumption that the child's parent or guardian retains control over the care and education of the child. *See, e.g.*, 20 U.S.C. §1232g and 34 C.F.R. Part 99 (affording parents access to and requiring parental consent for release of "educational records"); 20 U.S.C. §1232h and 34 C.F.R. Part 98 (requiring parental consent for nonacademic examinations, testing and treatment); 20 U.S.C. §1415 and 34 C.F.S. §§300.344, 300.345 and 300.500 through 300.514 (requiring parental participation in the development of educational plans for and consent for the evaluation and placement of children with disabilities); Pa. Stat. Ann. Tit. 24, §13-1302 (providing for entitlement to free public education in district where *parent* resides); *Id.* at §14-1406 (placing responsibility on parents to seek health care recommended by school physician or nurse); 22 Pa. Code §12.5(c) (authorizing parents to prohibit use of corporal punishment); *Id.* at §§11.21 through 11.26 (authorizing temporary absences from school, upon parental request, for various reasons); *Id.* at §§14.25(b), (e), (f), (h), (m)(3), 14.32(c)(1) and (h), 14.35(c), and 14.61 through 14.67 (granting parents of students with disabilities to participate in the evaluation and placement of, and program develop-

11. The additional rights afforded to children with disabilities under both state and federal law are particularly relevant in the case of petitioner D.R., who is deaf.

ment for, their children). Indeed, unlike the child who is placed in a detention home or foster care arrangement under Pennsylvania's Juvenile Act, 42 Pa. Cons. Stat. Ann. §§6301 through 6365, or committed involuntarily to a mental health facility under Pennsylvania's Mental Health Procedures Act, Pa. Stat. Ann. Tit. 50 §7101 through 7503, a child attending public school in Pennsylvania is not removed from the custody of his parents. On the contrary, residence with a parent or agent acting in that capacity is a condition of public school admission. *See* Pa. Stat. Ann. Tit. 24, §§13-1302, 13-1305, and 13-1306.

Petitioners have relied on the doctrine of *in loco parentis* to bolster their claim that public school officials somehow *do* have a parental, and therefore "special", relationship with public school students. Pennsylvania's Public School Code does contain a typical *in loco parentis* provision that authorizes school personnel to "exercise the same authority as to conduct and behavior" of the student as the student's parent may exercise, Pa. State. Ann. Tit. 24, §13-1317. This provision, however, does not vest school personnel with all of the rights and responsibilities of parents. It affords only the *right* to exercise such control over students as is necessary to prevent disciplinary infractions or interference with education. *See*, *Axtell v. LaPenna*, 323 F. Supp. 1077, 1080 (W.D. Pa. 1971). The view of *in loco parentis* as a grant of authority to maintain orderly schools, as opposed to an obligation to do so, is entirely consistent with the Court's discussion in *Ingraham*, 430 U.S. at 675-76, which reviewed the doctrine in its common law context as a privilege.

In applying the clear precedent established by this Court in *DeShaney* to its reasonable interpretation of Pennsylvania compulsory school attendance law, the Circuit Court in this case thus had every reason to conclude that compulsory school attendance does not affirmatively restrain students whose parents opt to use the public schools from providing for their basic human needs. The Court was also thus justified in rejecting petitioners' attempts to liken compulsory attendance to incarceration or involuntary institutionalization. While your respondents certainly must agree that the issue presented in this case is important to the day-to-day operation of Pennsylvania public schools, the issue does not involve unsettled questions of federal

law and depends largely on the Circuit Court's interpretation of state law, to which this Court would typically and should here defer.

2. The *Obiter Dictum* Of The Fifth Circuit In A Case Not Involving Private Misconduct Is Insufficient To Create A Conflict With The Decisions Of The Third, Seventh and Tenth Circuits To Warrant Review By This Court

There is no conflict among the Circuit Courts of Appeals with respect to whether compulsory attendance in public schools is sufficiently custodial so as to give rise to a "special relationship" between the school authorities and students. Absent a "special relationship" no concomitant duty exists on the part of the school to protect the students from private harm. Only the Third, Seventh and Tenth Circuits have considered the specific issue of whether public school students have had their ability to provide for their own basic needs so limited by the state's mandatory attendance laws that the state has a duty to provide for, among other things, their reasonable safety.[12]

The Third Circuit, in the reported *en banc* decision below, specifically found that the school defendants' authority over students during the school day cannot be said to create the type of physical custody necessary to bring it within the "special relationship" noted in *DeShaney*, particularly when their channels for outside communications were not totally closed. *D.R. v. Middle Bucks Area Vo. Tech. School*, 972 F.2d at 1372. In distinguishing the foster children situation from that of public school students, the Court below recognized that unlike the foster child who is dependent on the state selected foster family for his basic needs the parents, not the school authorities, are responsible for the student's basic needs. 972 F.2d at 1372. The public school year is only 180 six hour days of classroom attendance. Pa. Stat. Ann. Tit. 24 §13-1327(b), 15-1501, 15-1504(a) (1962 and Supp. 1991). Even during the school day, the parents are responsible as the primary caretakers and decision-

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12. *D.R. v. Middle Bucks Area Vo. Tech. School*, 972 F.2d 1364 (3rd Cir. 1992); *J.O. v. Alton Community Unit School District 11*, 909 F.2d 267 (7th Cir. 1990); *Maldonado v. Jose*, 975 F.2d 727 (10th Cir. 1992).

makers. Pa. Stat. Ann. Tit. 24 §13-1327. In short, the Pennsylvania compulsory school attendance scheme does not so limit the students' liberty in the same fashion as incarceration or institutionalization that the protection afforded by the Due Process Claus is triggered.

In *J.O. v. Alton Community Unit School District 11*, 909 F.2d 267 (7th Cir. 1990), the Court of Appeals for the Seventh Circuit also found that compulsory attendance laws are not the functional equivalent of incarceration or involuntary institutionalization. Like the Third Circuit, the Seventh Circuit reasoned that parents maintain primary responsibility to provide for the basic needs of their children and that both school children and their parents "retain substantial freedom to act" thereby diluting any analogy to prisoners or the committed who are wholly and completely dependent upon the state. 909 F.2d at 272. In distinguishing the plight of the institutionalized and imprisoned, the *J.O.* court pointed out:

> "At most, the state might require a child to attend school, (citation omitted), but it cannot be suggested that compulsory school attendance makes a child unable to care for basic human needs. The parents still retain primary responsibility for feeding, clothing, sheltering and caring for the child. . . . (T)hese children and their parents retain substantial freedom to act. The analogy of a school yard to a prison may be a popular one for school-age children, but we cannot recognize constitutional duties based on a child's lament."

The Seventh Circuit concluded that "the government, acting through local school administrations, has not rendered its school children so helpless that an affirmative constitutional duty to protect arises." 909 F.2d at 272.

Most recently, the Court of Appeals for the Tenth Circuit in *Maldonado v. Josey*, 975 F.2d 727 (10th Cir. 1992), held that compulsory attendance laws in no way restrain a child's liberty so as to render the child and his parents unable to care for the child's basic needs, the defining factor in the *DeShaney* opinion for a finding of a "special relationship" between the state and the putative victim. The *Maldonado* court concluded that:

> Although a child may well be in the "custody" of the school authorities during school hours, this custody does not amount to a restraint that prohibits the child and his parents from caring for the basic needs of the child. Compulsory attendance laws do not alter the fact that parents retain ultimate responsibility for their child's food, shelter, clothing, medical care and reasonable safety. ... The compulsory education laws do not change the fact that the parents are the primary caretakers of the student; those same parents - and not the state - must determine and address the basic needs that each child has.

Maldonado v. Josey, 975 F.2d 727 (1992).

Petitioners rely on a recent Fifth Circuit decision, *Doe v. Taylor Independent School District*, 975 F.2d 137 (5th Cir. 1992), for the supposed "split" among the circuits concerning the significance of compulsory attendance requirements for school-age children in determining the coerciveness of the state's custody or control over students. The *Doe* decision does not determine if a "special relationship" exists between school authorities and students in the context of creating an affirmative state obligation to protect the students' liberty interests against harm inflicted from a private, as opposed to governmental, source. In *Doe*, a state actor, a school teacher, as opposed to a private third party, violated the student's liberty interest in her bodily integrity. While *Doe v. Taylor Independent School District* does contain expansive language with respect to a duty arising based upon the compulsory attendance law, nevertheless such *obiter dictum* may not establish a true "split" among the United States Circuit Courts of Appeals. *Keller v. Adams-Campbell Company*, 264 U.S. 314 (1924) (mere dictum in a decision of one court of appeals conflicting with the decision of another court of appeals is insufficient reason to grant a Petition for Writ of *Certiorari*).

There is a completely different rationale and theoretical underpinning for school authorities to protect their students from harm visited by one acting under color of state law such as the teacher in *Doe*, *supra*, from the situation where a pri-

vate, third party creates the harm. This court has already held in *Ingraham v. Wright*, 430 U.S. 651, 674 (1977) that where "school authorities, acting under color of state law, deliberately decide to punish a child for misconduct by restraining the child and inflicting appreciable physical pain," Fourteenth Amendment liberty interests are implicated. In fact, the Third Circuit, to whom this Writ is sought to be directed, has held that school authorities may be found liable for establishing and maintaining a policy, practice or custom with deliberate indifference to the consequences when a student has been sexually abused by a teacher. *Stoneking v. Bradford Area School District*, 882 F.2d 720 (3rd Cir. 1989) (*en banc*), cert. denied, 110 S. Ct. 840 (1990) (*Stoneking II*). Senior Circuit Judge Seitz specifically distinguished *Stoneking II* and its progeny in the court below because the harm resulted at the hands of a private actor. Just as Senior Circuit Judge Seitz found that the instant matter lacked the linchpin of *Stoneking II*, namely a violation by state actors, the same linchpin is missing in *Doe v. Taylor Independent School District*.[13]

Several of the other authorities cited in footnote 12 in the Petition for Writ of Certiorari for the proposition that a "special relationship" has been found to exist concern individuals acting under color of state law that violate the students' constitutional rights. In fact, of the seven decisions cited by petitioners, only six[14] are opinions of the court and of those only two[15] involve situations where a private party has assaulted or otherwise caused harm to the students.

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13. *Doe v. Taylor Independent School District*, rather than evidencing a "split" in the Circuits regarding compulsory attendance laws creating the same quality of personal restraint as imprisonment, is consistent with *Stoneking II*'s analysis of *DeShaney* regarding a policy or practice of deliberate indifference to *state*, as opposed to private, abuse.

14. Petitioners list the concurring opinion in *Maldonado v. Jose*, 975 F.2d 727 (10th Cir. 1992) in the tabulation of federal judge views in petitioners' footnote 12.

15. Only *Pagano v. Massapequa Public Schools*, 714 F. Supp. 641 (E.D. N.Y. 1989) and *Stauffer v. Orangeville School District*, 1990 U.S. Dist. Lexis 19133 and 19041 (N.D. Ill. 1990) consider the issue of a private, non-state actor inflicting harm on a student and *Stauffer* declined to recognize a "special relationship".

In *Robert G. v. Newburgh City School District*, 1990 U.S. Dist. Lexis 91 (S.D.N.Y.), a student had been sexually assaulted by a substitute teacher. In that case, in rejecting the defendant's reliance upon the *DeShaney* limitations on any duty, the court pointed out that the plaintiff there alleged a deprivation of a protected liberty interest at the hands of a public school employee. In addition, in *Doe "A" v. Special School District of St. Louis County*, 637 F.Supp. 1138 (E.D. Mo. 1986), the issue involved whether a school district could be made to answer for the constitutional deprivation of a student's right to be free from unconsented to sexual assaults by a student teacher. Again, the issue of harm from a private party had not been present. Moreover, in *Whitt v. Deleu*, 707 F. Supp. 1011 (W.D. Wis. 1989), a school employee allegedly sexually abused minors in his charge. Lastly, in *Waechter v. School District No. 14-030*, 773 F. Supp. 1005 (W.D. Mich. 1991), a teacher ordered a student with a known congenital heart defect to run a 350 yard sprint as punishment for talking with another classmate. The teacher in *Waechter* directly caused the harm - a wholly disparate scenario from harm visited by a private, third party.

Even *Stauffer v. Orangeville School District*, 1990 U.S. Dist. Lexis 19133 (N.D. Ill. 1990), recognized the school has no general duty to protect students from the torts of third parties but, under the facts of that case, allowed plaintiff's Complaint to survive a Preliminary Motion to Dismiss because the state allowed plaintiff to go to a rest room unsupervised with another student who had a prior history of sexually molesting others and who had threatened plaintiff, thereby placing the plaintiff in imminent danger. In fact, in rejecting the rationale of *Pagano v. Massapequa Public Schools*, 714 F. Supp. 641 (E.D. N.Y. 1989), the *Stauffer* court stated:

> This court, however, does not find the reasoning in *Pagano* persuasive. Although the state retires (sic) children to attend school, this does not create a deprivation of liberty similar to that imposed on prisoners or persons who are involuntarily committed to a state institution. If this were the case then every time a school child is assaulted by the class bully during

> recess, there would be a tort of constitutional dimensions under §1983.

Stauffer v. Orangeville School District, 1990 U.S. Dist. Lexis 19133 (N.D. Ill. 1990).

This Court has cautioned that the Due Process Clause functions as a limitation on state power and only creates an affirmative duty to protect its citizens when the state enters into a special relationship with a particular citizen. *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 195 (1989). It is the state's affirmative act of restraining the individual's freedom to act on his own behalf, through incarceration, institutionalization or other similar restraint of personal liberty which is the "deprivation of liberty" under the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means. *DeShaney*, 489 U.S. at 200. The Due Process Clause is not a "guarantee of certain minimal levels of safety and security." *Id.* Petitioners' effort to broaden the *DeShaney* standard for a "special relationship" to include students subject to compulsory education rules, thereby acknowledging a similar degree of state coercion over students as that exercised over prisoners or the involuntarily committed, must be refused. Not every tort occurring in a school yard should be "federalized" into a constitutional deprivation because the school authorities have a limited license by virtue of the *in loco parentis* standing conferred by the Pennsylvania legislature.

Most recently, the United States District Court for the Eastern District of Pennsylvania considered whether a high school wrestling coach owed a constitutional duty to protect a wrestler from his adversary. *Fenstermaker v. Nesfedder*, 1992 U.S. Dist. Lexis 13129 (E.D. Pa. 1992). This fact pattern illustrates the likely types of disputes the district courts will be burdened to hear if a "special relationship" exists with a student. There, the District Court, relying on *D.R.*, found the plaintiff did not raise any deprivation of a right secured by the Constitution because the coach did not directly injure him. There have been other attempts to state a substantive due

process claim when no state action directly caused harm.[16] In each of these cases, the courts refused to stretch the definition of a "special relationship" so as to find a duty absent direct state action. One court eloquently articulated the need to halt potential erosion of federalist principles by rejecting any duty to protect football players from one another by stating:

> "If the court were to accept the plaintiff's argument here that the Constitution somehow imposes a duty on school officials to provide for the safety of students with respect to extracurricular activities, even though their participation in these activities is wholly voluntary, then there would no longer be any practical distinction between ordinary state law negligence claims and federal constitution violations, so long as the negligent party was acting under color of state law."

Reeves by Jones v. Besonen, 754 F. Supp. 1135, 1139 (E.D. Mich. 1991).

Whatever duty is owed by school authorities in the context of protecting against injury from other than state actors is best left to the individual states. While various states do have immunity provisions for the actions of governmental officials[17], the existence (or non-existence) of a state tort remedy is not determinative of a substantive due process claim.

The reach of substantive due process cannot be extended indefinitely. Although petitioners accuse Senior Circuit Judge Seitz of shedding crocodile tears in the majority opinion below, not every tort committed by a state actor is to be transformed into a constitutional violation. *D.T. by M.T. v. Independent School District No. 16*, 894 F.2d 1176, 1188 (10th Cir. 1990),

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16. *Reeves by Jones v. Besonen*, 754 F. Supp. 1135, 1139 (E.D. Mich. 1991) (holding that no substantive due process claim is stated by a high school football player injured during a hazing ritual on the team bus); *Voorhies v. Conroe Independent School District*, 610 F. Supp. 868, 872-73 (S.D. Tex. 1985) (dismissing a §1983 claim brought by a student injured by a table saw operated without a safety guard in a high school workshop.

17. Pennsylvania, for instance, broadly immunizes political subdivisions and their actors for negligent conduct. However, there are exceptions to the grant of immunity, including but not limited to, willful misconduct. 42 Pa.C.S.A. §8541, et seq.

cert. denied, _____ U.S. _____, S. Ct. 213 (1990). Given substantive due process serves as a limitation on state action and creates affirmative obligations on the part of the state in only limited, narrow circumstances, i.e. the *Estelle/Youngberg* exceptions to the general rule of no duty, it is respectfully urged that this court reject petitioners' request for certiorari because the opinion below appropriately found no "special relationship" to exist by virtue of the mandatory attendance laws and no "split" between the Circuits exists.

CONCLUSION

Since no "special relationship" exists between school authorities and students such that the students and/or their parents' ability to provide for the students' basic needs have been so limited by state action, it is respectfully requested that this court deny the Writ of *Certiorari* in this matter. Moreover, the Third, Seventh and Tenth Circuits, the only circuit courts of appeals to consider if a "special relationship" exists such as to give rise to a concomitant duty to protect students against harm from private actors, have uniformly held that compulsory school attendance does not render students or their parents unable to care for basic needs. The Writ of *Certiorari* directed to the United States Court of Appeals for the Third Circuit is also unnecessary to, as petitioners suggest, discern a neutral principle finding a duty where the state played a role in creating any danger because instant plaintiffs have failed to plead sufficient facts to demonstrate that the school defendants violated any constitutional duty by creating or exacerbating any danger posed by the student defendants.

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CERTIFICATE OF SERVICE

I, Robert G. Devine, Esquire, hereby certify that I have, on this date copies of *Respondent*, Susan Peters', **Brief In Opposition to Petition for a Writ of Certiorari to The United States Court of Appeals For The Third Circuit** to be served by regular, first-class mail to:

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